

Chicago-Kent Law Review

Volume 91

Issue 1 *Congressional Dysfunction and
Executive Lawmaking During the Obama
Administration*

Article 13

1-29-2016

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Recommended Citation

Kyle J. Jacob, *From Garner to Graham and Beyond: Police Liability for Use of Deadly Force — Ferguson Case Study*, 91 Chi.-Kent L. Rev. 325 (2016).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol91/iss1/13>

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FROM GARNER TO GRAHAM AND BEYOND: POLICE LIABILITY FOR USE OF DEADLY FORCE – FERGUSON CASE STUDY

KYLE J. JACOB*

INTRODUCTION

At approximately noon on Saturday, August 9, 2014, an unarmed black teenager was shot to death by a white police officer in the St. Louis suburb of Ferguson, Missouri. The details of the shooting have been widely disputed. Some believe that the officer was jumped, beaten, and overpowered and resorted to the only measure he had available to defend himself from a hostile assailant. Others believe the officer's use of deadly force amounted to criminal homicide. Suffice it to say, popular opinion regarding the shooting is anything but unified. Regardless of the ultimate question of responsibility, in the aftermath of the shooting, media headlines, blogs, commentary, and social media posts tell a harrowing tale of social unrest that blazed not only through the streets of Ferguson, but across the entire nation:

"Ferguson Police shoots unarmed black kid 10 times"¹; "An Unarmed Teen's Killing: Understanding the Brown Case"²; "Missouri crowd after shooting: 'Kill the Police'"³; "'Crying for Justice': Thousands Attend Michael Brown Funeral"⁴; "Prosecutor in Brown Case

*Thank you first and foremost to my wonderful wife, Amy Jacob, for her enduring support and patience through this and all the other projects that have consumed my time for the past year. Her love and support are my most cherished and important lifeline. Thank you also to Professor Richard Wright of Chicago-Kent College of Law for his guidance and expertise in the realm of tort law. Finally, thank you to David Schrock, Esq. of the firm Scheldrup Blades for his perspective and expertise as an esteemed public municipality defense lawyer in Cedar Rapids, Iowa.

1. SouthernGirl2, *Ferguson Police Shoots Unarmed Black Kid 10 Times*, 3CHICSPOLITICO (Aug. 9, 2014), <http://3chicspolitico.com/2014/08/09/ferguson-police-shoots-unarmed-black-kid-10-times-2/>.

2. Elizabeth Chuck, *The Killing of an Unarmed Teen: What We know About Brown's Death*, NBC NEWS (Aug. 13, 2014, 5:03 AM), <http://www.nbcnews.com/storyline/michael-brown-shooting/killing-unarmed-teen-what-we-know-about-browns-death-n178696>.

3. Alan Scher Zagier, *Missouri Crowd After Shooting: 'Kill the Police'*, ASSOCIATED PRESS (Aug. 10, 2014, 5:44 AM), <http://bigstory.ap.org/article/missouri-crowd-after-shooting-kill-police>.

4. John Brecher & Tracy Connor, *'Crying for Justice': Thousands Mourn Michael Brown at Funeral*, NBC NEWS (Aug. 25, 2014, 3:04 PM), <http://www.nbcnews.com/storyline/michael-brown-shooting/crying-justice-thousands-mourn-michael-brown-funeral-n188346>.

Has Deep Family Ties to Police”⁵; “Evidence supports officer’s account of shooting in Ferguson”⁶; “Doesn’t take 100 days to decide if murder is a crime, it takes 100 days to figure out how to tell people it isn’t. . . #FergusonDecision”⁷; “In Protests From Midwest to Both Coasts, Fury Boils Over”⁸; “I find it very disappointing that you’re not talking about the fact that 93% of blacks in America are killed by other blacks . . . Why don’t you cut it down so so many white police officers don’t have to be in black areas . . . The white police officers wouldn’t be there if you weren’t killing each other”⁹; “Businesses Ablaze, Bullets Fly in Mayhem After Grand Jury Decision”¹⁰; “Violence like we saw last night cannot be repeated. Mtg w/ law enforcement & Guard to ensure protection of lives & property in days ahead.”¹¹; “What’s happened here in the last six years? Gays got gay marriage, Hispanics got amnesty for illegals, and African-Americans apparently are gonna be able to riot without anybody stopping them if they want to.”¹²

Regardless of where the truth lies, what we are left with is a dead body, an ostracized police officer, and an angry public, vigilant and bent on vengeance at one end of the spectrum, ignorant and insensitive to the reality of racial tensions that continue to fester in many poverty-stricken urban settings on the other. We are also left with a question: Who is responsible for Michael Brown’s death? One obvious answer is Officer Darren Wilson. Another is the Ferguson Police

5. Elizabeth Chuck, *Prosecutor in Michael Brown Case Has Deep Family Ties to Police*, NBC NEWS (Aug. 20, 2014, 10:18 AM), <http://www.nbcnews.com/storyline/michael-brown-shooting/prosecutor-michael-brown-case-has-deep-family-ties-police-n183911>.

6. Kimberly Kindy & Sari Horwitz, *Evidence Supports Officer’s Account of Shooting in Ferguson*, WASH. POST (Oct. 23, 2014), http://www.washingtonpost.com/politics/new-evidence-supports-officers-account-of-shooting-in-ferguson/2014/10/22/cf38c7b4-5964-11e4-bd61-346aee66ba29_story.html.

7. Chris Rock (@ozchrisrock), TWITTER (Nov. 24, 2014, 8:17 PM), <https://twitter.com/ozchrisrock/status/537067600447275008>.

8. John Eligon & Manny Fernandez, *In Protests from Midwest to Both Coasts, Fury Boils Over*, N. Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/frustration-months-in-the-making-boils-over-on-the-streets-of-ferguson.html>.

9. Stephen Rex Brown, *Rudy Giuliani Causes Racial Firestorm for Citing Black Crime Stats in Debate on Michael Brown Shooting (VIDEO)*, DAILY NEWS (Nov. 24, 2014, 5:16 AM), <http://www.nydailynews.com/news/politics/rudy-giuliani-firestorm-comments-mo-shooting-article-1.2021368>.

10. Ron Allen & Erin McClam, *Ferguson: Businesses Ablaze, Bullets Fly in Overnight Mayhem over Grand Jury*, NBC NEWS (Nov. 25, 2014), <http://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-businesses-ablaze-bullets-fly-overnight-mayhem-over-grand-jury-n255526>.

11. Governor Jay Nixon (@GovJayNixon), TWITTER (Nov. 25, 2014, 7:18 AM), <https://twitter.com/GovJayNixon/status/537263998560129025>.

12. Rush Limbaugh, *Holder Goes Full-Scale Hamas: Cops Are Occupying Force in Neighborhoods of Color*, RUSH LIMBAUGH SHOW (Dec. 2, 2014), http://www.rushlimbaugh.com/daily/2014/12/02/holder_goes_full_scale_hamas_cops_are_occupying_force_in_neighborhoods_of_color.

Department. Yet another is Michael Brown. A fourth, society. And perhaps a final possibility is some combination of all four. What is unquestionable is that we, as a society, have a fundamental need to place blame and responsibility *somewhere*.

Responsibility, of course, can mean several different things.¹³ This paper seeks to take up the question of responsibility in the context of civil liability for Michael Brown's death¹⁴ under 42 U.S.C. § 1983 ("§ 1983") pertaining to actions against government officials for deprivation of citizens' civil rights.¹⁵

This paper does not presume to have complete knowledge of what actually happened on the afternoon of August 9, 2014, nor does it intend to place any judgment upon the parties, regardless of where fault or blame truly lies. The purpose of this article, rather, is to perform a modest socio-legal analysis to consider how a specific case of police use of force, particularly deadly force, may impact a community, and even society at large, in controversial cases where assignment of blame, or more precisely liability, is not clear. The shooting death of Michael Brown at the hands of the police has illuminated the simple truth that "justice," as the public perceives it, is as much about appearance as it is about substance. Put simply, the current state of

13. The focus of this article is on civil liability for excessive force by police officers in the commission of their duties. In order to hold a law enforcement agency liable for a § 1983 claim (as opposed to the individual officers), a plaintiff must show there was improper or insufficient training in the use of force that contributed to the officer's unreasonable use of force. See, e.g., *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390–91 (1989). A plaintiff may also sue the public municipality in which the law enforcement agency resides for allowing a custom or policy that fosters police misuse of force. See, e.g., *MacEachern v. City of Manhattan Beach*, 623 F.Supp.2d 1092, 1105 (C.D. Cal. 2009). In addition to the three § 1983 claims against Wilson, the police department and the municipality, state common law claims for wrongful death, MO. ANN. STAT. § 537.080 (West 2014), and first degree assault, MO. ANN. STAT. § 565.050 (West 2014), could also be pleaded under the court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). The state common law claims would be particularly vulnerable to summary judgment based on the doctrine of official immunity which shields individual officers, police agencies and municipalities from tort liability arising from claims related to the performance of their discretionary acts, and prevents liability from attaching when an officer is acting to respond to an emergency. See, e.g., *Conway v. St. Louis Cty.*, 254 S.W.3d 159, 164 (Mo. App. E. Dist. 2008) (citing *Davis v. Lambert-St. Louis Int'l Airport*, 193 S.W.3d 760, 763 (Mo. 2006)).

14. Most states, including Missouri, have survivor statutes which allow a deceased person's estate to maintain a cause of action on behalf of the decedent/plaintiff for tort actions resulting in personal injury or death. See, e.g., MO. ANN. STAT. § 537.020 (West 2014). Therefore, any lawsuit would be brought by Brown's next of kin, likely his mother.

15. While there had been a substantial push to hold Officer Wilson criminally responsible for the death of Michael Brown, a Missouri Grand Jury proceeding as well as a federal Justice Department investigation conducted did not result in any criminal charges against Officer Wilson. See Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges for Officer in Michael Brown's Death*, NAT'L PUB. RADIO (Nov. 24, 2014, 3:37 PM), <http://www.npr.org/blogs/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case>.

the law regulating police use of deadly force, particularly when racial undertones exist, does not *seem* just to those claiming a disparate impact, regardless of how the legal process may work out in practice. It is this perception of injustice and inequity that stokes the flames of public animosity and outrage over cases like that of Michael Brown.

Section I of this paper will discuss the general law and necessary elements for a *prima facie* case under § 1983, including protections afforded to government officials in such proceedings. Section II will take up an evaluation of the “objective reasonableness” standard announced by the Supreme Court in evaluating claims brought under § 1983 for excessive force by looking at the progression of the legal standard employed in the two leading use of force cases, *Tennessee v. Garner* (1985) and *Graham v. Connor* (1989). Section II also discusses how a § 1983 claim would proceed under the existing standard announced in *Garner* and *Graham*, using the rough and developing facts of the Ferguson situation as a case study. Section III examines a substantive due process standard as a possible alternative to use in analyzing a § 1983 claim as advanced by Judge Friendly in his decision in *Johnson v. Glick* (1976), which was accepted as a possible alternative standard by Justice Blackmun in his concurring opinion in *Graham*. Finally, Section III also explores the problem with exclusive reliance on the Fourth Amendment, with its corresponding “objective reasonableness” standard, to support a claim of excessive force under § 1983 and how Judge Friendly’s alternative substantive due process standard addresses those shortcomings.

I. CIVIL ACTION FOR DEPRIVATION OF RIGHTS PURSUANT TO 42 U.S.C. § 1983

A civil claim against a law enforcement officer, and the agency employing them, for excessive force, including improper use of deadly force, is actionable under 42 U.S.C. § 1983 which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress¹⁶

16. 42 U.S.C. § 1983 (2012).

In order to successfully bring a claim under § 1983 for excessive force, a plaintiff begins by identifying the specific constitutional right allegedly infringed upon by the challenged application of force.¹⁷ In an excessive force case, this will generally involve a claimed violation of the plaintiff's rights under the Fourth Amendment to the United States Constitution.¹⁸ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁹

The term "seizure" in a policing context means more than simply an arrest in the traditional sense. The legal term spans a wide spectrum, from a routine traffic stop, to pre-arrest interrogation, to the application of force.²⁰ As the intrusiveness of the search or seizure intensifies, the scrutiny applied to whether it was reasonable intensifies.²¹ Therefore, the highest level of scrutiny is employed in evaluating the utilization of deadly force.²²

To defend against an assertion that a seizure was unreasonable *per se*, a showing of probable cause to support the seizure must be made.²³ Typically, an officer establishes probable cause to support a particular search or seizure by obtaining a warrant issued by a judicial officer.²⁴ However, when exigent or emergency circumstances make obtaining a warrant impossible, or at least impracticable, a police officer is required to have articulable probable cause in order to combat

17. *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

18. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (stating "[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in . . . 'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

19. U.S. CONST. amend. IV.

20. *Id.*

21. See *Samson v. California*, 547 U.S. 843, 843 (2006) (quoting *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (holding "[t]he 'totality of the circumstances' must be examined to determine whether a search is reasonable under the Fourth Amendment. Reasonableness 'is determined by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'")).

22. See *Price v. Sery*, 513 F.3d 962, 970 (9th Cir. 2008) (quoting *Fikes v. Cleghorn*, 47 F.3d 1011, 1014 n.2 (9th Cir. 1995) (reasoning "the use of 'deadly force' is only justified if the officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or others . . . the kind of surrounding circumstances that uniquely justify the use of deadly force—a threat of serious physical harm or worse")).

23. *Coolidge v. New Hampshire*, 403 U.S. 443, 469 (1971).

24. *Id.*; *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012); *Steagald v. United States*, 451 U.S. 204, 222 (1981).

an assertion that the seizure was *per se* unreasonable for the purposes of the Fourth Amendment and § 1983.²⁵ Probable cause exists when there are “facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.”²⁶ The Supreme Court has held that, in evaluating the totality of the circumstances available to the officer at the time of the search or seizure, the standard to be employed is that of a “prudent person.”²⁷ The officer’s subjective belief, or intent, is irrelevant to the analysis of probable cause.²⁸ In situations where obtaining a warrant is not possible or practical, an officer may establish probable cause when “a reasonable police officer in the same circumstances and possessing the same knowledge as the officer in question could have reasonably believed that probable cause existed in light of well established law.”²⁹ By obtaining arguable probable cause, police officers are entitled to immunity from civil liability.³⁰

The doctrine of qualified immunity protects government officials, such as police officers, “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³¹ Qualified immunity is generally sought in the form of a dispositive motion and is meant to prevent non-actionable claims from proceeding past the preliminary, dispositive stage of litigation.³² Failure to raise a defense of qualified immunity during the initial pleading stage, or very shortly

25. See, e.g., *United States v. Moreno*, 701 F.3d 64, 72–73 (2d Cir. 2012) (holding “that the warrant requirement of the Fourth Amendment must yield [where] exigent circumstances require law enforcement officers to act without delay”) (internal quotation marks omitted); see also *United States v. Andino*, 768 F.3d 94, 98 (2d Cir. 2014).

26. *Michigan v. DeFillipo*, 443 U.S. 31, 37 (1979); see also *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975); *Adams v. Williams*, 407 U.S. 143, 148 (1972); *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Draper v. United States*, 358 U.S. 307, 313 (1959); *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949); *Carroll v. United States*, 267 U.S. 132, 162 (1925).

27. *United States v. Harris*, 464 F.3d 733, 738 (7th Cir. 2006) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

28. *Whren v. United States*, 517 U.S. 806, 813 (1996).

29. *Lee v. Sandberg*, 136 F.3d 94, 102 (2d Cir. 1997) (quoting *Gold v. City of Miami*, 121 F.3d 1442, 1445 (11th Cir. 1997)); see also *Cerrone v. Brown*, 246 F.3d 194, 202–03 (2d Cir. 2001).

30. *Cerrone*, 246 F.3d at 202–03.

31. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

32. See, e.g., *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998) (Stevens, J., concurring); *Ahmad v. Furlong*, 435 F.3d 1196, 1198 (10th Cir. 2006).

thereafter, by a motion to dismiss or motion for summary judgment generally results in a presumptive waiver of the defense whereby defendant will be precluded from raising it as a defense at trial or on appeal.³³

If the officer's conduct was clearly unreasonable, qualified immunity will be denied.³⁴ In the context of an excessive force claim, the doctrine of qualified immunity operates "to protect officers from the sometimes hazy border between excessive and acceptable force."³⁵ "Qualified immunity shields an officer from suit when [he or] she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [he or] she confronted."³⁶ It extends to a government official's "objectively reasonable mistakes, 'regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'"³⁷

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."³⁸ To resolve this inquiry, the Supreme Court in *Saucier v. Katz* set forth a two-step inquiry to determine whether a government official is entitled to the protection of qualified immunity.³⁹ In *Pearson v. Callahan*, the Court granted lower courts more flexibility "to exercise their sound discretion in deciding which of the two prongs . . . should be addressed first in light of the circumstances in the particular case at hand."⁴⁰

In applying the *Saucier* test, the Eighth Circuit reasoned:

33. *Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 668 (5th Cir. 1996).

34. See, e.g., *Headwaters Forest Defense v. Humboldt*, 276 F.3d 1125, 1126 (9th Cir. 2002) (wherein officers used Q-tips to apply pepper spray to the eyes of nonviolent protestors and failed to wash it out); *Deorle v. Rutherford*, 272 F.3d 1272, 1272 (9th Cir. 2001) (wherein police officer shot an unarmed, compliant suspect in the head with a less-lethal beanbag ammunition without warning out of a desire to immediately resolve the situation).

35. *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (quoting *Priester v. Riviera Beach*, 208 F.3d 919, 926–27 (11th Cir. 2000)); see also *Gallegos v. Freeman*, 291 P.3d 265, 270 (Wash. App. Div. 1 2013) *review denied*, 308 P.3d 641 (Wash. 2013) (holding an officer utilizing deadly force to apprehend a fleeing suspect was entitled to qualified immunity).

36. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

37. *Hensley v. Gassman*, 693 F.3d 681, 687 (6th Cir. 2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

38. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

39. *Saucier*, 533 U.S. at 200–01.

40. *Pearson*, 555 U.S. at 236.

In determining whether an officer is entitled to qualified immunity, we ask (1) whether, taking the facts in the light most favorable to the injured party, the alleged facts demonstrate that the official's conduct violated a constitutional right; and (2) whether the asserted constitutional right is clearly established. We may address either question first. If either question is answered in the negative, the public official is entitled to qualified immunity. To determine whether a right is clearly established we ask whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.⁴¹

Once it has been determined that an officer is not entitled to qualified immunity, whether the officer faces liability, in their official capacity, for excessive force under § 1983 turns on whether the use of force was "reasonable." The natural question that arises is, what constitutes a "reasonable" use of force? And, should the same standard apply to both the use of less-lethal force and deadly force? To explore these questions, we turn first to the story of Edward Garner.

II. FROM *GARNER* TO *GRAHAM* – "OBJECTIVE REASONABLENESS" AND MICHAEL BROWN

A. *Tennessee v. Garner*

In the 1985 case of *Tennessee v. Garner*, the Supreme Court held that a Tennessee law stating, if upon giving lawful notice of intent to arrest, a criminal defendant attempts to flee, "the officer may use all the necessary means to effect the arrest," was unconstitutional.⁴² The Court reasoned that this law violated the Fourth Amendment's prohibition against unreasonable seizures because it authorized the use of deadly force against unarmed, non-dangerous, fleeing suspects.⁴³

In *Garner*, two Memphis police officers, Elton Hymon and Leslie Wright, responded to a call for a suspected burglary at approximately 10:45 p.m.⁴⁴ Upon arriving on scene, the officers observed the suspect run across the backyard, stopping and crouching at the base of a 6-foot tall chain link fence.⁴⁵ At trial, Officer Hymon testified that he

41. *Wallingford v. Olson*, 592 F.3d 888, 892 (8th Cir. 2010); see also *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009); *Howard v. Kansas City Police Dep't*, 570 F.3d 984, 987–88 (8th Cir. 2009).

42. *Tennessee v. Memphis Police Dep't*, 471 U.S. 1, 11 (1985).

43. *Id.*

44. *Id.* at 3.

45. *Id.*

shone a flashlight on the suspect, later identified as Edward Garner.⁴⁶ While he could not be certain, Hymon testified he was “reasonably sure” and “figured” that Garner was unarmed.⁴⁷ Officer Hymon also testified that, based on what he observed, he believed the suspect was about five foot five inches tall, had a slight build, and was about seventeen or eighteen years old.⁴⁸ Officer Hymon issued a verbal command to Garner, calling out “police halt,” and took a few steps towards him when Garner jumped up and began to climb the fence.⁴⁹ Officer Hymon testified that he was convinced that if Garner made it over the fence he would escape and therefore fired one shot, fatally wounding him with a shot to the back of his head.⁵⁰

Garner’s father brought a claim under § 1983 for violation of his deceased son’s civil rights with regards to the police’s use of deadly force.⁵¹ The Court stated that, to ascertain whether the seizure was reasonable, they must balance the extent of the intrusion against the need for it.⁵² In performing this calculus, the Court reasoned, “[t]he suspect’s fundamental interest in his own life need not be elaborated upon,” and that “[t]he use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.”⁵³ On the other hand, the Court reasoned that “[a]gainst these interests are ranged governmental interests in effective law enforcement,” including the State’s assertion that “overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee.”⁵⁴ In weighing these competing interests, the Court held “[w]ithout in any way disparaging the importance of these [government] goals, we are not convinced that the

46. *Id.*

47. *Id.*

48. *Id.* at 3–4. Edward Garner was in fact 15 years old and was confirmed to be unarmed when he was killed. *Id.* at 24. It was also confirmed that the house was unoccupied at the time of the burglary. *Garner v. Memphis Police Dep’t, City of Memphis, Tenn.*, 600 F.2d 52, 53 (6th Cir. 1979). Ten dollars and a purse taken from the house were found on Garner’s body. *Garner*, 471 U.S. at 4.

49. *Id.*

50. *Id.*

51. *Id.* at 5; Garner’s father was able to bring the claim under the Tennessee survivor statute as next of kin on behalf of his deceased son. See TENN. CODE ANN. § 20-5-106 (West 2011).

52. *Garner*, 471 U.S. at 8; see also *United States v. Place*, 462 U.S. 696, 703 (1983).

53. *Garner*, 471 U.S. at 9 (emphasis added).

54. *Id.*

use of deadly force is a sufficiently productive means of accomplishing them to justify killing of nonviolent suspects.”⁵⁵ The Court ultimately held that, “[i]t is not better that all felony suspects die than that they escape,” and ruled that the Tennessee statute was thus unconstitutional “insofar as it authorize[d] the use of deadly force against . . . fleeing suspects.”⁵⁶

However, the Court did not foreclose the use of deadly force to apprehend a fleeing suspect as being unconstitutional *per se*. Instead, the Court held that where an officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or the public at large, it is not constitutionally unreasonable to prevent escape by using deadly force.⁵⁷ The Court clarified that, “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escapes, and if, where feasible, some warning has been given.”⁵⁸

Following the decision in *Garner*, there has been much debate among the lower courts as to what constitutes a “weapon”⁵⁹ as well as when a suspect “poses a threat of serious physical harm”⁶⁰ to either the officer or the public at large.

Interestingly, the decision in *Garner* was not unanimous. In her dissenting opinion, Justice O’Connor⁶¹ took issue with the majority’s underlying assumption that “[t]he suspect’s fundamental interest in his own life need not be elaborated upon.”⁶² Justice O’Connor argued that, “[t]his blithe assertion hardly provides an adequate substitute for the majority’s failure to acknowledge the distinctive manner in which

55. *Id.* at 10 (citing *Delaware v. Prouse*, 440 U.S. 648, 659 (1979)).

56. *Id.* at 11.

57. *Id.*

58. *Id.* at 11–12.

59. See, e.g., *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (noting a car could be a deadly weapon so officer using deadly force to stop the car from injuring others was reasonable).

60. See, e.g., *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding an officer “had probable cause to believe that [a] truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves”); *contra Estate of Starks v. Enyart*, 5 F.3d 230, 235 (7th Cir. 1993) (finding summary judgment inappropriate on a Fourth Amendment claim involving a fleeing suspect because the suspect’s failure to brake when an officer suddenly stepped in front of his just-started vehicle was not a sufficiently serious threat to justify the use of deadly force).

61. Chief Justice Burger and Justice Rehnquist joined in the dissent. *Garner*, 471 U.S. at 29 (Burger J., and Rehnquist, J., dissenting).

62. *Garner*, 471 U.S. at 29 (O’Connor, J., dissenting).

the suspect's interest in his life is even exposed to risk."⁶³ Instead, Justice O'Connor gave greater weight to the government's interest in general crime control and deterrence reasoning "[t]he legitimate interests of the suspect in these circumstances are adequately accommodated . . . [to] avoid the use of deadly force and the consequent risk to his life, the suspect need merely obey the valid order to halt."⁶⁴

While an entire article could be devoted to how the public reacted to the Court's decision in *Garner*, a snapshot supports the presumption that public perception following the death of Edward Garner was diametrically opposed to Justice O'Connor's view of acceptable use of force standards.⁶⁵ What was clear was that constitutional limits needed to be placed on police use of force, particularly when dealing with application of deadly force. Ironically, the bounds of those limits proved much more harmonious with Justice O'Connor's view of the proper standard for evaluating police use of force than the majority opinion in *Garner* seemed to suggest. To explore this further, we turn to the case of *Dethrone Graham*.

B. Graham v. Connor

Four years after the decision in *Garner*, in the case of *Graham v. Connor*, *Dethrone Graham* brought an action under § 1983 against Officer Connor and the Charlotte Police Department claiming a violation of his civil rights based on a seizure while police investigated a suspected shoplifting incident.⁶⁶

One important difference between the *Garner* and *Graham* cases is that *Graham* did not involve police use of deadly force. However, as is discussed in Section III, despite this glaring difference, the majority in *Graham* essentially abrogated the substantive distinction between application of non-deadly and deadly force.

On the morning of the incident in question, *Graham*, a diabetic, felt the onset of an insulin reaction and asked a friend, William Berry, to drive him to a nearby convenience store to buy orange juice in order

63. *Id.*

64. *Id.*

65. See, e.g., *Welcome Curb on Deadly Force*, N. Y. TIMES (Mar. 29, 1985), <http://www.ny-times.com/1985/03/29/opinion/a-welcome-curb-on-deadly-force.html>; Linda Greenhouse, *High Court Limits Rights of Police to Shoot to Kill*, N. Y. TIMES (Mar. 28, 1985), <http://www.ny-times.com/1985/03/28/us/high-court-limits-rights-of-police-to-shoot-to-kill.html>.

66. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

to stabilize his blood sugar levels.⁶⁷ Berry did as his friend asked, but when they arrived at the store, Graham saw that there were a number of customers ahead of him in the checkout line.⁶⁸ Concerned over the delay this would cause in regulating his blood sugar, Graham rushed out of the store and asked Berry to take him to Berry's house instead.⁶⁹

Officer Connor observed Graham hastily enter and exit the store and became suspicious, leading him to follow Berry's car.⁷⁰ Officer Connor made an investigatory stop of the vehicle and, despite Berry's attempt to explain the situation, ordered both men to wait where they were until he could find out what occurred at the convenience store.⁷¹ When Officer Connor returned to his patrol car to call for backup, Graham, who had begun to enter into diabetic shock, exited the vehicle, ran around it twice and collapsed on the curb, where he passed out briefly.⁷² Shortly thereafter, several other Charlotte police officers arrived on scene in response to the request for backup.⁷³

At this time, one of the officers rolled Graham onto the sidewalk and applied handcuffs tightly behind his back, ignoring pleas from Berry that Graham was diabetic and needed sugar.⁷⁴ The officers dismissed Berry's assertion that Graham had diabetes, with one making disparaging comments and suggesting instead that he was drunk.⁷⁵ Several officers then proceeded to lift Graham up from behind, carry him to Berry's car, and slam him face down on the hood of the vehicle.⁷⁶ Once he regained consciousness, Graham asked officers to check his wallet for a diabetic decal he carried, but this request was met with more disparaging remarks.⁷⁷ Shortly thereafter, Officer Connor received a report that Graham had not done anything wrong and drove him home where he released him.⁷⁸ As a result of this incident,

67. *Id.*

68. *Id.* at 388–89.

69. *Id.*

70. *Id.* at 389.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

Graham sustained a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and developed a loud ringing in his right ear.⁷⁹

Graham brought suit claiming the police used excessive force in making the pre-arrest seizure.⁸⁰ While considering a motion for directed verdict brought by the defendants, the District Court considered a four factored test to determine when the use of excessive force gave rise to a cause of action under § 1983.⁸¹ Those factors included: “(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) ‘[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.’”⁸² The District Court granted Defendants’ motion for directed verdict finding that the amount of force applied by the officers was “appropriate under the circumstances” and was applied in “good faith.”⁸³

On appeal, a divided panel of the Court of Appeals for the Fourth Circuit affirmed the District Court’s ruling.⁸⁴ The majority held that the District Court had applied the correct standard in assessing petitioner’s excessive force claim and adopting the four-factored test applied by the District Court as generally applicable to all claims of excessive force.⁸⁵ The dissenting judge argued that, based on the decisions of *Terry v. Ohio*⁸⁶ and *Tennessee v. Garner*, excessive force claims arising under the Fourth Amendment were appropriately examined under the “objective reasonableness” standard.⁸⁷

79. *Id.* at 390.

80. *Id.* at 388.

81. *Id.* at 390.

82. *Id.*

83. *Id.* at 390–91.

84. *Id.* at 391.

85. *Id.* This four-factored test originated from Judge Friendly in his opinion in *Johnson v. Glick* wherein Judge Friendly looked to neither the Fourth nor Eighth Amendments but to substantive due process in evaluating excessive force claims holding, “quite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.” 481 F.2d 1028, 1032 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973). Judge Friendly used the four-factored test to guide the Court in determining “whether the constitutional line has been crossed” by the particular use of force. *Id.* at 1033.

86. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

87. *Graham v. Connor*, 490 U.S. 386, 392 (1989).

The Supreme Court granted certiorari and reversed.⁸⁸ While this outcome certainly seems appropriate, the larger ramifications of the majority's reasoning have inflicted a resounding blow on future litigants' ability to challenge police use of force, particularly in claims involving deadly force.

In his majority opinion, Justice Rehnquist built off of the dissenting opinion that he supported in *Garner*, holding that:

[T]he test of reasonableness is not capable of precise definition or mechanical application . . . The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.

Moreover, in response to the District Court and Court of Appeals employing a substantive due process analysis, looking in part to the subjective motivations and intentions of the officer as well as to the extent of the injury suffered by the plaintiff, the Court announced that the reasonableness inquiry in an excessive force case is an objective one.⁸⁹ The majority wrote, "the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."⁹⁰ The Court further reasoned that even an "officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force."⁹¹

This statement is particularly troubling and, as is discussed in Section III, the "objective reasonableness" standard announced by the Court in *Graham* has become a defacto shield for law enforcement who are afforded great deference in determining when a particular use of force is "objectively reasonable" in the circumstances presented. While *Graham* presented a fairly easy case, that is police had no objectively reasonable basis for utilizing any degree of force, this standard has proved quite problematic in "close call" cases involving police utilization of deadly force against suspects who *arguably* pose a threat of serious harm to officers or the public at large.

88. *Id.*

89. *Id.* at 397.

90. *Id.*

91. *Id.*

In his concurring opinion in *Graham*, Justice Blackmun⁹² reasoned that, while he agreed with the Court's finding that "the Fourth Amendment is the primary tool for analyzing claims of excessive force in the prearrest context," he saw, "no reason for the Court to find it necessary further to reach out to decide that prearrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive due process standard."⁹³ Justice Blackmun further stated he did not agree that the Court's prior decision in *Garner* supported such a reading.⁹⁴ Acknowledging that reliance on the Fourth Amendment was a wise choice for *Graham*, Justice Blackmun explained, "I expect that the use of force that is not demonstrably unreasonable under the Fourth Amendment only rarely will raise substantive due process concerns."⁹⁵ However, he concluded that "until I am faced with a case in which that question is squarely raised . . . I do not join in foreclosing the use of substantive due process analysis in prearrest cases."⁹⁶

Justice Blackmun likely asserted that the use of the Fourth Amendment was a wise choice for *Graham* because it was obvious, using an "objective reasonableness" standard, that the officers' use of force against a non-violent and, in fact, innocent individual in the midst of a diabetic seizure was unreasonable. Looking to the subjective motivations and intentions of the officers, whether they were acting in "good faith" and whether there was a less harmful alternative available, does not matter when it is obvious that the use of force is objectively unreasonable. Nothing in the circumstances that the police found themselves in would lead a reasonable officer to believe any degree of force was reasonable or necessary in detaining *Graham*. The *Brown* case, on the other hand, falls more in the category of a "close call" where it is not so clear what amount of force was reasonable, or more precisely necessary, to end the threat that *Brown* posed, whatever that threat may have been.

Cases like the shooting death of Michael Brown may be exactly the sort of case that Justice Blackmun was eluding to when he refused to join the majority in foreclosing the use of a substantive due process

92. Justices Brennan and Marshall joined in the concurrence. *Graham*, 490 U.S. at 399 (Blackmun, J., concurring).

93. *Id.* at 399–400.

94. *Id.* at 400.

95. *Id.*

96. *Id.*

analysis for evaluating police use of force. However, the remainder of Section II will address how a § 1983 claim would proceed under the existing precedents of *Garner* and *Graham*, with the corresponding “objective reasonableness” standard. Section III will then contrast this with how the same case may unfold under a substantive due process evaluation, initially presented by Judge Friendly in his 1976 decision in *Johnson v. Glick* and which Justice Blackmun would have left open as a possible alternative pathway to an actionable § 1983 claim in *Graham*.

C. Garner, Graham, and Michael Brown

Under the existing law, to commence an action against Officer Wilson, Brown’s mother would file a Complaint with the United States District Court for the Eastern District of Missouri claiming a violation of her deceased son’s civil rights. The claim would be brought pursuant to 42 U.S.C. § 1983 based on a violation of Brown’s right to be “secure in [his] person[] . . . from unreasonable . . . seizures” under the Fourth Amendment, applicable to the states through the Due Process Clause of the Fourteenth Amendment.⁹⁷

Missouri law regulating police use of deadly force affords law enforcement officers the full grant of authority allowable under *Garner* and *Graham*.⁹⁸ Specifically, the state statute authorizes police to use deadly force “in effecting an arrest or in preventing an escape from custody . . . when [the officer] reasonably believes . . . [it] is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested has committed or attempted to commit a felony . . . or may otherwise endanger life or inflict serious physical injury unless arrested without delay.”⁹⁹

Based on the decision in *Graham*, a purely objective perspective would be employed in evaluating the reasonableness of Officer Wilson’s decision to use deadly force.¹⁰⁰ Emphasizing this purely objective perspective, the *Graham* Court reiterated, “subjective concepts like ‘malice’ and ‘sadism’ have no proper place in that inquiry.”¹⁰¹ Subsequent jurisprudence in the area of police excessive force in the

97. U.S. CONST. amends. IV, XIV.

98. MO. ANN. STAT. § 563.046 (West 2014).

99. *Id.*

100. *See Graham*, 490 U.S. at 397.

101. *Id.* at 399. The Court did, however, note that “in assessing the credibility of an officer’s account of the circumstances that prompted the use of force, a factfinder may consider, along

wake of *Graham* has established that, where “potential danger, emergency conditions or other exigent circumstances are present,” the “standard of reasonableness is comparatively generous to the police.”¹⁰² While the case law does not make clear what constitutes a “potential danger,” whether a lower court is addressing substantive liability or qualified immunity, “the Supreme Court intends to surround the police who make . . . on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases.”¹⁰³

Given this extremely deferential posture, depending on the evidence fleshed out during initial discovery, it is very likely that the § 1983 claim brought on behalf of Michael Brown, under the current standard, would result in summary judgment in favor of Officer Wilson either on the issue of qualified immunity or substantive liability. This is particularly true if there is no credible evidence supporting the theory that Brown was attempting to surrender when he was shot to death.¹⁰⁴

Looking to what appear to be the undisputed facts, Michael Brown and Dorian Johnson, ages eighteen and twenty-two respectively, visited Ferguson Market and Liquor a little before noon and stole a pack of cigarillos.¹⁰⁵ Immediately after the two young men left the liquor store, a 911 call was placed to report the theft and, within minutes, a police dispatcher relayed information to officers on duty that the suspects of an alleged theft were walking northbound on a road running adjacent to the liquor store.¹⁰⁶ Shortly thereafter, while patrolling in his squad car, Ferguson police officer Darren Wilson encountered Brown and Johnson walking in the middle of the road and ordered them to get out of the street.¹⁰⁷ While Wilson had not initially made contact with Brown and Johnson because of the reported theft, soon after the initial encounter, he recognized that the young men matched the description relayed by dispatch as being involved in a

with other factors, evidence that the officer may have harbored ill-will toward the citizen.” *Id.* at 399 n.12; see also *Scott v. United States*, 436 U.S. 128, 139 (1978).

102. *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994).

103. *Id.* (emphasis added).

104. Based on the outcome of the Missouri Grand Jury indictment proceedings and the Department of Justice investigation into the shooting, it is very unlikely that such evidence can be marshaled. See Peralta & Chappell, *supra* note 15.

105. Rachel Clarke & Christopher Lett, *What Happened when Michael Brown Met Officer Darren Wilson*, CNN (Nov. 11, 2014, 5:22 PM), http://www.cnn.com/interactive/2014/08/us/ferguson-brown-timeline/index.html?iid=article_sidebar.

106. *Id.*

107. *Id.*

suspected theft and reengaged them.¹⁰⁸ A dispute arose that progressed into a physical altercation between Brown and Wilson including wrestling through the window of Wilson's squad car.¹⁰⁹ As the two wrestled, a shot was fired from Wilson's gun from within the vehicle that struck Brown and caused him to flee from the immediate vicinity of the vehicle.¹¹⁰ Wilson immediately exited his vehicle, issued at least one verbal command, and shortly thereafter, Brown, who was later confirmed to be unarmed, was shot to death by Wilson.¹¹¹ An autopsy report revealed that Brown had been shot at least six times, including gunshot wounds to his right hand, arm, chest, and head.¹¹² The autopsy further indicated that Brown sustained a close proximity gunshot wound to his right hand, indicative of a struggle over Officer Wilson's gun while the two wrestled through the window of Wilson's vehicle.¹¹³ Beyond these salient facts, the stories of the respective parties, and those reverberating through American mainstream and underground media outlets, substantially diverge.¹¹⁴

For the purposes of this article, a few factual assumptions are made. It is assumed that Officer Wilson did not confront Brown and

108. Transcript of Grand Jury (Volume V) at 208–09, *State of Mo. v. Darren Wilson* (Mo. Cir. Ct. Sept. 10, 2014) (transcript at <https://www.documentcloud.org/documents/1370494-grand-jury-volume-5.html>).

109. Clarke, *supra* note 105.

110. *Id.*

111. *Id.*

112. See Frances Robles & Julie Bosman, *Autopsy Shows Michael Brown Was Struck At Least 6 Times*, N. Y. TIMES (Aug. 17, 2014), http://www.nytimes.com/2014/08/18/us/michael-brown-autopsy-shows-he-was-shot-at-least-6-times.html?_r=0; ST. LOUIS CTY., OFFICE OF THE MED. EXAM'R, POST-MORTEM EXAMINATION (2014).

113. Christine Byers, *Official Autopsy Shows Michael Brown Had Close-Range Wound to his Hand, Marijuana in System*, ST. LOUIS TODAY (Oct. 22, 2014), http://www.stltoday.com/news/local/crime-and-courts/official-autopsy-shows-michael-brown-had-close-range-wound-to/article_e98a4ce0-c284-57c9-9882-3fb7df75fef6.html; POST-MORTEM EXAMINATION, *supra* note 112.

114. See *supra* Introduction. In his Grand Jury testimony, Dorian Johnson painted Wilson as the aggressor stating he initiated the physical altercation and shot Brown to death when Brown was attempting to surrender. Transcript of Grand Jury (Volume IV) at 45–54, 100–23, *State of Mo. v. Darren Wilson* (Mo. Cir. Ct. Sept. 10, 2014) (transcript at <http://graphics8.nytimes.com/newsgraphics/2014/11/24/ferguson-assets/grand-jury-testimony.pdf>). Wilson, on the other hand, testified that Brown was the aggressor, asserting Brown attacked him, began punching him in the face and was overpowering him while wrestling for his gun, leaving him no choice but to fire his weapon. Transcript of Grand Jury (Volume V), *supra* note 108, at 208–36. Wilson indicated that even without Brown grabbing for his gun, he was authorized to use deadly force when Brown was punching him in his face. *Id.* at 236–37. Wilson described his need in firing the final fatal shots, stating Brown stopped fleeing, turned around and charged at him. *Id.* at 234. Wilson also explained his reasoning for pursuing Brown stating, “what would stop him from doing what he has just did to me to [another officer] or worse, knowing he has already done it to one cop.” *Id.* at 281.

Johnson with the intent of murdering Brown. It is also assumed that Officer Wilson was acting in furtherance of his duties as a law enforcement officer when he and Brown became engaged in a physical altercation. Finally, it is assumed that the forensic evidence offered will support that Brown and Wilson wrestled through the window of Wilson's squad car, including wrestling over Wilson's gun once it was drawn, causing the close proximity gunshot wound to Brown's right hand. At that point, the uncontested facts support that Brown fled from the immediate vicinity of Wilson's squad car before the fatal shots were fired.

At this point, three possibilities emerge. One, Brown turned and attempted to surrender when Wilson shot and killed him. Two, Brown turned and charged toward Wilson when Wilson shot and killed him. Or three, Brown turned and did not either immediately charge toward Wilson or attempt to surrender. The first scenario presents an easy case, whereby assessment of liability under the "objective reasonableness" standard would be straightforward. No reasonable officer could believe that an unarmed suspect who is trying to surrender poses a serious risk of harm to either the officer or the public such that use of deadly force would be warranted. The second and especially the third scenarios seem to fall in what Justice Kennedy dubbed the "hazy border between excessive and acceptable force,"¹¹⁵ that the "objective reasonableness" standard is ill-suited to address. Is an unarmed suspect, who's only "weapon" is his body, a serious enough threat to an officer's safety to justify the use of deadly force? Under the second scenario, does an unarmed suspect "charging" at an officer elevate the risk of serious harm such that deadly force is appropriate? Under the third scenario, if the suspect is not charging towards the officer, but also is not heeding orders to surrender, does that justify use of deadly force? Would some form of less-lethal force have been more appropriate?

As the *Graham* court suggests, the deference given to police in utilization of force is meant to cast a "wide zone of protection in close cases," which will typically manifest itself in a grant of qualified immunity, unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have

115. *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (quoting *Priester v. Riviera Beach*, 208 F.3d 919, 926–27 (11th Cir. 2000)).

known.”¹¹⁶ Of course, what is “clearly established” is a matter of perspective and the deferential posture afforded to police tends to tip this balance in favor of immunity for police in close cases.

However, even if the case survived summary judgment, the court must instruct the jury to determine whether the officer’s use of force was “objectively reasonable” by balancing “the nature and quality of the intrusion on the individual’s Fourth Amendment interests” against the interests of the police in making the arrest in the particular manner it was made.¹¹⁷ Here, that of course entails utilization of deadly force. As the Court in *Graham* announced:

Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.¹¹⁸

Given this deferential posture, the Court has held that the jury should be instructed to give careful attention to the facts and circumstances of the case, “including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”¹¹⁹ These factors must be considered “in light of the facts and circumstances confronting them, without regard to underlying intent or motivation.”¹²⁰ Any “evil intentions” motivating an officer’s objectively reasonable use of force “will not make a Fourth Amendment violation.”¹²¹

A case somewhat similar to the fact pattern in the *Brown* case which applied this standard is *Brosseau v. Haugen*.¹²² In *Brosseau*, the Supreme Court addressed a § 1983 claim involving police use of deadly force wherein a police officer shot an unarmed suspect in the back while trying to evade arrest. While on first blush, the Court’s prior decision in *Garner* would seem to render such use of force patently

116. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

117. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

118. *Id.* at 396–97 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (internal quotation marks and citations omitted)).

119. *Id.*

120. *Id.* at 397.

121. *Id.*

122. *Brosseau v. Haugen*, 543 U.S. 194, 194 (2004).

unconstitutional, the Court found that Haugen, the suspect, possessed a “weapon,” his vehicle, and posed a threat of “serious harm” to officers and the public at large.¹²³ Therefore, the Court decided that qualified immunity prevented the claim from even progressing past the dispositive stage, thus negating the need to even reach the question of whether the officer’s use of deadly force was “objectively reasonable.”

As the Court discussed, “[we] ask whether, at the time of [the officer’s] actions, it was ‘clearly established’ in this more ‘particularized’ sense that she was violating Haugen’s Fourth Amendment right.”¹²⁴ In reaching their decision, the Court noted that the parties pointed to a handful of cases “relevant to the ‘situation [Officer Brosseau] confronted’: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.”¹²⁵ Specifically, Officer Brosseau’s representatives pointed to *Cole v. Bone* and *Smith v. Freland*¹²⁶

In *Cole* and *Smith*, no Fourth Amendment violations were found when an officer shot a fleeing suspect who “presented a risk to others.”¹²⁷ Specifically, in *Cole* officers engaged in a high speed chase of a suspect driving an eighteen wheel tractor-trailer recklessly, refusing to yield to roadblocks, ramming police cars, and forcing civilian motorists off of the roadway, resulting in police shooting the suspect in the head, killing him, to end the pursuit.¹²⁸ Likewise, in *Smith* the officer engaged in a car chase, which appeared to be at an end when the officer cornered the suspect at the back of a dead-end residential street.¹²⁹ However, the suspect freed his car and began speeding down the street at which point the officer shot and killed the suspect.¹³⁰ The officer’s use of deadly force was found to be reasonable, and therefore not in violation of the Fourth Amendment, because the

123. *Id.* at 200.

124. *Id.* at 199–200 (citing *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

125. *Id.* at 200.

126. *Id.*

127. *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993) (holding the officer “had probable cause to believe that the [suspect’s] truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves.”); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (noting “a car can be a deadly weapon” and holding the officer’s decision to use deadly force to stop the car from possibly injuring others was reasonable).

128. *Cole*, 993 F.2d at 1330–31.

129. *Freland*, 954 F.2d at 344.

130. *Id.*

suspect “had proven he would do almost anything to avoid capture” and posed a serious threat to the other officers at the end of the street.¹³¹

On the other hand, Haugen pointed to *Estate of Starks v. Enyart* “where the court found summary judgment inappropriate on a Fourth Amendment claim involving a fleeing suspect.”¹³² The *Starks* court held that the threat created by the fleeing suspect’s failure to brake when an officer suddenly stepped in front of his just-started car was not a sufficiently grave threat to justify the use of deadly force.¹³³

Taken together, the court in *Brosseau v. Haugen* reasoned, the three cases “undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau’s actions fell in the ‘hazy border between excessive and acceptable force.’”¹³⁴ The court definitively held, however, that these cases “by no means ‘clearly establish’ that Brosseau’s conduct violated the Fourth Amendment” and therefore reversed the decision of the court of appeals finding that Brosseau was entitled to qualified immunity for her use of deadly force in shooting Haugen in the back as he attempted to drive away.¹³⁵

Applying the holding and reasoning of *Brosseau* to the case of Michael Brown, if the evidence shows that Officer Wilson and Brown initially wrestled over Wilson’s gun, the requirement that Wilson reasonably believed deadly force was necessary given the *possible* danger Brown continued to pose after he fled from the immediate vicinity of the vehicle is likely satisfied. Such apprehension would combat any assertion by Brown’s representatives that Wilson’s conduct violated a “clearly established” constitutional protection because there is no such protection afforded to citizens to resist arrest by flight once an officer has a reasonable belief that the suspect is dangerous. The fact that Brown wrestled with a police officer over his firearm would provide the ongoing threat of serious harm that the court found to be a prerequisite to a finding of “objective reasonableness” in *Graham* and subsequently elaborated upon in *Brosseau*. As Officer Wilson testified during his Grand Jury testimony “what would stop him from doing

131. *Id.*

132. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004).

133. *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993).

134. *Brosseau*, 543 U.S. at 198 (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

135. *Id.*

what he has just did to me to [another officer] or worse, knowing he has already done it to one cop.”¹³⁶ Certainly, if Brown’s representatives could prove that Brown’s wrestling over the gun was merely done in self-defense, that would not provide sufficient grounds for Officer Wilson to believe that Brown posed a threat of serious harm to himself or others. However, based on the outcome of the Grand Jury proceedings and Justice Department investigations, the likelihood of Brown’s representatives marshaling such evidence is quite low.

Instead, under the existing law, as Justice O’Conner suggested in her dissenting opinion in *Garner*, which Justice Rehnquist joined and built upon in his majority opinion in *Graham*, Brown essentially assumed the risk of deadly force by committing a violent felony, wrestling with Wilson over his gun, and thereafter forfeited any Fourth Amendment interest he had to resist arrest by flight or non-deadly force. Therefore, Wilson’s use of deadly force, did not violate a “clearly established” constitutional protection such that qualified immunity would likely be granted because Brown *arguably* posed a risk of serious harm, even after he fled from the immediate vicinity of Wilson’s vehicle. Moreover, even if qualified immunity were not granted, Wilson’s use of deadly force would likely be found to be “objectively reasonable” in the circumstances because of the ongoing threat Brown posed, regardless of any underlying subjective motivations or intentions that operated at the time the fatal shots were fired.

The force employed by Wilson was no more unreasonable than the force applied in *Brosseau*, *Cole* or *Smith*, where the parties did not dispute that the respective suspects were attempting to flee when deadly force was employed. Here, the facts are unclear as to whether Brown was attempting to flee or was continuing to resist arrest by force when he was shot to death. Wilson’s representatives would argue that Brown’s recklessness and proclivity to violence, exhibited by his attempting to wrestle a gun away from a police officer, created a serious risk of harm to Wilson and others that continued to exist even once Brown fled from the immediate vicinity of Wilson’s vehicle. Therefore, Wilson’s decision to employ deadly force to neutralize that threat did not violate a “clearly established” constitutional protection, as Brown had assumed the risk associated with the use of deadly force and effectively waived any protection he would otherwise have

136. Transcript of Grand Jury (Volume V), *supra* note 108, at 281.

had; thus, the use of force was “objectively reasonable” in the circumstances.

Given the current state of the law and the apparently uncontested facts of the Brown case, it is very difficult to see a § 1983 claim surviving summary judgment. Whether or not that is the “right” outcome in this case is immaterial to this discussion. What is material, however, is *how* that conclusion is reached. By relying solely on the “objective reasonableness” standard to justify police use of deadly force to shoot and kill an unarmed suspect, the law ignores a key question that any lay person would ask. Was there anything else that could have been done to avoid the loss of life? Maybe, and maybe not. But that question ought to be asked and exclusive reliance on the lens of “objective reasonableness” does not allow it to be.

III. IS THERE ANOTHER WAY?

A possible alternative to the narrow perspective that the “objective reasonableness” standard affords was addressed by Judge Henry Friendly sitting for the Second Circuit in the 1976 case *Johnson v. Glick*. In *Glick*, Judge Friendly addressed the validity of a § 1983 claim brought by a prisoner against the warden and a guard at a detention facility alleging the guard made an unprovoked attack on him and detained him in a holding cell for two hours before returning him to his cell.¹³⁷ When the prisoner requested medical attention, the guard held him in his cell for another two hours before permitting him to see a doctor.¹³⁸ Struggling to apply the Eighth Amendment prohibition against cruel and unusual punishment to the case before him, Judge Friendly looked instead to a prior case decided by the Second Circuit that had invoked a substantive due process analysis under the Fourteenth Amendment as the constitutional basis for a § 1983 claim.¹³⁹ The trouble, Judge Friendly reasoned, with applying the Eighth Amendment to the case was twofold.

First, he recognized that a single act by a rogue prison guard did not present the type of institutional abuse that is typically required to satisfy a claim of cruel and unusual punishment under the Eighth Amendment because it was done in accordance with some existing

137. *Johnson v. Glick*, 481 F.2d 1028, 1029–30 (2d Cir. 1973).

138. *Id.*

139. *Id.* at 1031; see also *Rosenberg v. Martin*, 478 F.2d 520, 526 (2d Cir. 1973) (wherein Judge Knapp stated in dictum “[w]e assume that brutal police conduct violates a right guaranteed by the due process clause of the Fourteenth Amendment”).

institutional policy or procedure.¹⁴⁰ Judge Friendly stated that, “[t]he thread common to all these cases is that ‘punishment’ has been deliberately administered for a penal or disciplinary purpose, with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners.”¹⁴¹ In contrast, Judge Friendly suggested that, while certainly cruel and hopefully unusual, a spontaneous act by a prison guard did not fit with any ordinary meaning of “punishment.”¹⁴² Second, Judge Friendly expressed that “[w]e have considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence.”¹⁴³ However, “it would be absurd,” Judge Friendly observed, “to hold that a pre-trial detainee has less constitutional protection against acts of prison guards than one who has been convicted.”¹⁴⁴

To resolve these problems with applying the Eighth Amendment to a case where it appeared obvious that justice demanded liability be imposed, Judge Friendly held, “both before and after sentence, constitutional protection against police brutality is not limited to conduct violating specific command of the Eighth Amendment or . . . the Fourth.”¹⁴⁵ Instead, Judge Friendly suggested, “*Rochin v. California*¹⁴⁶ must stand for the proposition that, quite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.”¹⁴⁷

In *Rochin* – the Supreme Court decision Judge Friendly relies upon as the basis for applying a substantive due process analysis to a § 1983 claim – the Court elaborated upon the purpose of the Due Process Clause stating:

140. *Glick*, 481 F.2d at 1032.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Rochin v. People of Cal.*, 342 U.S. 165, 172 (1952) (in addressing the constitutionality of a conviction based on coercion, Justice Frankfurter held “[i]t has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained”).

147. *Glick*, 481 F.2d at 1032 (citing *Rochin*, 342 U.S. at 170–71)); see also *Collum v. Butler*, 421 F.2d 1257, 1259 (7th Cir. 1970) (“[T]he force used by the officers was unreasonable and unnecessary to restrain the plaintiff thus violating his constitutional right of due process.”); *Tolbert v. Bragan*, 451 F.2d 1020, 1020 (5th Cir. 1971) (“Severe physical abuse of prisoners by their keepers without cause or provocation is actionable under the Civil Rights Act.”).

Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' . . . Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' or are 'implicit in the concept of ordered liberty.'¹⁴⁸

Recognizing that a test was needed to gauge when an intentional use of force rose to the level of a constitutional infringement, Judge Friendly suggested four factors for courts to consider in *Glick*.¹⁴⁹ Those factors included, "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."¹⁵⁰

Ultimately, Judge Friendly found that in applying the four factored test he had announced, the dismissal of Johnson's complaint against the officer, Fuller, for excessive force was not appropriate and reversed the lower court's ruling with respect to Officer Fuller.

While substantive due process is a hotly contested area of constitutional law, even the most conservative approaches to a substantive application of the Due Process Clause have recognized that the core individual rights protected by the Constitution generally and the Due Process Clause specifically are "life, liberty, [and] property."¹⁵¹ It is difficult to imagine a more valuable individual right than the right to one's own life. Certainly, this is something that has traditionally been afforded great protection by the laws and courts of this country.

Turning to the case of Michael Brown, applying the four-factored substantive due process test employed by Judge Friendly in *Glick*, a

148. *Rochin*, 342 U.S. at 169.

149. *Glick*, 481 F.2d at 1033.

150. *Id.*

151. U.S. CONST. amends. V, XIV; see, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (wherein Justice Scalia announced "the language of the Due Process Clauses of the Fifth and Fourteenth Amendments . . . focus . . . on the processes by which life, liberty, or property is taken"); *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) ("We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called 'heightened scrutiny' protection—that is, rights which are 'deeply rooted in this Nation's history and tradition' such as the right to life, liberty, or property as expressly stated in the text of the Fourteenth Amendment.") (internal citations omitted).

much different perspective emerges in evaluating Officer Wilson's conduct, specifically his decision to employ deadly force, than exists under an "objective reasonableness" approach. This difference in perspective is illuminated by looking to each of Judge Friendly's factors in turn:

(1) The need for the application of force:

This factor changes the perception of the officer's use of force. Instead of asking whether the officer's use of force was "objectively reasonable," the court inquires whether the use of force was necessary. Depending on what the evidence bears as to whether Brown or Officer Wilson was the instigator of the initial physical altercation, the need for the officer to employ *some* amount of force would be a jury question. That is, if Wilson instigated the altercation, forcing Brown to take action merely in self-defense, then the initial need for *any* amount of force would be doubtful and this factor may be dispositive in favor of Brown.¹⁵²

On the other hand, if the evidence bears out that Brown instigated the physical altercation, Wilson would of course be within his rights to respond with *some* level of force. However, whether *any* level of force is necessary is only the first step in the equation. The relationship between the need for *some* amount of force and the *amount* of force actually employed (less-lethal versus deadly force) is taken up in Judge Friendly's second factor.

(2) The relationship between the need and the amount of force that was used:

Even if we assume some level of force was justified, either because Brown instigated the physical altercation or the physical altercation derived mutually from both parties, the relationship between the need for *some* level of force and the *amount* of force actually employed must coincide. Therefore, if it is assumed that there was a physical struggle through the window of Wilson's car over his gun, once a shot was fired and Brown fled from the immediate vicinity of the vehicle, the jury would need to determine whether the continued need for some level of force to detain Brown and the amount of force

152. Even under an "objective reasonableness" analysis, in such easy cases where no amount of force was reasonable or necessary, the underlying constitutional hook, Fourth Amendment or Due Process Clause of the Fourteenth Amendment, would not matter.

actually used, shooting Brown five more times, was appropriate in the circumstances to secure Wilson's objective of detaining Brown.

This crucial step, examining the relationship between the need for the use of force and the amount of force actually used, completely shifts the focus of the analysis from what *could* be construed as a reasonable amount of force in the circumstances to what *was* the necessary amount of force in the particular circumstance. While it may have been "objectively reasonable," under the deferential "objective reasonableness" approach, for Wilson to use deadly force to detain Brown after he exhibited a threat of serious harm to Wilson and others by wrestling with him over his gun,¹⁵³ it is less clear whether that same level of force was *necessary*.

Judge Friendly's model allows the court and jury to consider the basic question of whether there was something else Officer Wilson could have done to attain his objective other than resorting to deadly force. This would be a question of fact for the fact-finder to determine upon consideration of all of the available evidence, but it is plausible for Brown's representatives to argue that Wilson had alternatives to the utilization of deadly force. Could he have remained in his squad car until backup arrived?¹⁵⁴ Could he have used less lethal force, such as a baton or pepper spray,¹⁵⁵ to detain Brown? Should departmental practices have required that Wilson carry a Taser or beanbag projectile at all times while on duty as an alternative, less-lethal force option to detain hostile suspects where use of deadly force can be avoided? While the answers to these questions are not clear and would need to be resolved through the adversarial process, the mere fact of asking whether there was anything that could have been done differently would, from a sociological perspective, help allay the inherent coldness and sense of institutionalized inequity and indifference that attaches to a justification of "objective reasonableness" for the loss of life.

153. Just as the Court found existed in *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993); and *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992). See *supra* Section II.C.

154. Wilson testified that he radioed for backup prior to the physical altercation with Brown and that additional officers arrived on scene no more than a minute after the fatal shots were fired. Transcript of Grand Jury (Volume V), *supra* note 108, at 208–36.

155. Wilson testified that he was given a choice, but elected not to carry a Taser. *Id.* at 206.

(3)The extent of injury inflicted:

Application of this factor to the use of deadly force is, of course, quite simple. The loss of life is the most serious injury a person can sustain. Despite its simple application in the case of Michael Brown, this factor serves the important function of placing the sanctity of life at the forefront of the analysis in police use of deadly force cases. To pass constitutional muster under a substantive due process analysis, the officer must account for the necessity of their use of force in relation to the injury ultimately suffered by the plaintiff, in this case, death. Therefore, Officer Wilson would need to establish that his decision to use deadly force, with the foreseeable consequence of the suspect's death, was necessary and was the only reasonable option available to him to protect his own life or the life of others in order to justify the use of deadly force. This again infers that the officer has exhausted any alternative, less-lethal force options that could have been utilized to obtain the same result, in this case, detaining Brown. Of course, as with civilian use of deadly force in self-defense or defense of others, this factor is not *dispositive* if an officer reasonably misapprehends a serious threat to their life or the life of another.¹⁵⁶ However, an officer's reasonable misapprehension of the situation they were confronted with would not shield the officer from civil liability, as would generally be the case under an "objective reasonableness" approach,¹⁵⁷ if, on balance, the four-factored substantive due process test weighs in favor of imposing liability.

This leads back to the discussion under the second factor of Judge Friendly's analysis, whether the amount of force used was necessary. If there is any doubt about that factor, coupled with this third factor, the extent of injury inflicted, in this case death, then the two factors weigh heavily in favor of imposing civil liability under a substantive due process approach. This approach still shields individual officers who are forced to make split-second decisions in hostile situations, from criminal responsibility for such decisions. However, police agencies, responsible for training, supervising and equipping officers in the field, would be forced to take responsibility for officers' faulty decisions to resort to the use of deadly force when it is not deemed to be necessary in the circumstances.

156. See RESTATEMENT (SECOND) OF TORTS §§ 65, 76 (AM. LAW INST. 1965).

157. See, e.g., *Hensley v. Gassman*, 693 F.3d 681, 687 (6th Cir. 2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

(4) Whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

This factor is somewhat problematic because it seems to infer that for liability to attach under a substantive due process analysis, the officer's conduct had to be "malicious and sadistic." This amounts essentially to a criminal law standard of proof. In the case of Brown, this would be particularly problematic because a Grand Jury declined to bring criminal charges against Wilson. This suggests that the evidence did not bear out that Wilson's use of deadly force was "malicious and sadistic." However, this factor must be considered in the context of the other three factors in considering the totality of the circumstances. That is, if the first three factors heavily favor imposing liability, it is not necessary to show that the use of force was "sadistic or malicious." Even if the use of force was applied "in good faith," if it was not necessary, the need for the use of some level of force was substantially out of proportion to the amount of force actually employed, and the extent of the injury to the plaintiff was severe, liability would still attach.

However, if the need for the use of some level of force is apparent, but the officer's use of force was "sadistic and malicious" (e.g. in bad faith with an intent to harm), then liability would also attach. An example of such a scenario can be envisioned in the present case. If it is assumed that Wilson did have a legitimate need to employ deadly force in order to detain Brown, but he fired an extra three or four rounds because he was angry over the initial confrontation and wanted to kill rather than merely detain Brown, liability would attach based on this factor.

This factor further highlights the difference between the "objective reasonableness" standard and the substantive due process standard. Under the "objective reasonableness" standard, in the foregoing hypothetical, Wilson's subjective motivations or evil intentions in firing the extra three or four rounds would be irrelevant so long as a reasonable officer in the circumstances would believe the use of deadly force was reasonable in the circumstances.¹⁵⁸ Courts have consistently held that, where an officer reasonably perceives, even if this turns out to be a misperception in hindsight, a threat of serious harm to other officers or the public, shooting with the intention to kill

158. See *Graham v. Connor*, 490 U.S. 386, 397 (1989).

does not offend constitutional principles.¹⁵⁹ Therefore, an officer's use of lethal force would pass constitutional muster under an "objective reasonableness" standard where the officer can articulate probable cause to believe the suspect posed a serious risk of harm to other officers or the public *without* inquiring as to the officer's subjective intentions when the fatal shots were fired. Under Judge Friendly's rubric, such subjective intentions or motivations *are* relevant, and in fact central, to the consideration of whether the use of deadly force was appropriate in the circumstances.

Ultimately, it would be left up to the finder of fact to determine whether, considering the totality of the circumstances, the four factors of Judge Friendly's subjective due process analysis supported Officer Wilson's decision to use deadly force or whether such force was unnecessary such that liability would attach. However, it is clear that this analysis provides much greater consideration and protection to the individual's fundamental interest in their own life and to the societal interest in the sanctity of all human life. If at the end of the presentation of evidence, a jury found that there was simply nothing else Officer Wilson could have reasonably done differently in the circumstances he encountered, no liability would attach to his decision to employ deadly force. But, the mere fact that such inquiry is made goes to the very question that the "objective reasonableness" standard fails to address to the detriment of those touched most closely by the death of Michael Brown: "Wasn't there anything else that could've been done?"

159. See, e.g., *Thomas v. Baldwin*, 595 Fed. Appx. 378, 380–81 (5th Cir. 2014) (unpublished) (detective's use of deadly force in fatally shooting suspect was objectively reasonable, and thus did not violate Fourth Amendment; although there was no weapon found in suspect's vicinity, detective's account of the events, corroborated by affidavits of others at the scene, indicated that suspect failed to comply with detective's instructions and appeared to be reaching for a weapon before detective shot him, and there was no indication that suspect was fleeing at the time he was shot); *Melvin v. Karman*, 550 Fed. Appx. 218, 219 (5th Cir. 2013) (unpublished) (detectives decision to shoot and kill a fifteen year old boy in his bedroom was objectively reasonable where the boy wielded a knife, failed to heed the officers' instructions to drop the knife, and approached the officers wielding the knife); *Chappell v. City of Cleveland*, 585 F.3d 901, 915–16 (6th Cir. 2009); *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 404–05 (6th Cir. 2007) (where a police sniper fired two shots, fatally wounding the suspect, did not amount to excessive force because the officer reasonably believed the suspect holding a rifle at waist level posed a risk of significant harm to approaching officers); *contra Weiland v. Palm Beach Cty. Sheriff's Office*, No. 13-14396, 2015 WL 4098270, at *8 (11th Cir. 2015) (holding allegations that deputies responding to 911 call shot caller's son without warning when he did not pose a threat was sufficient to state excessive force under the Fourth Amendment).

B. Seeking "Justice" for Ferguson

As Justice Blackmun noted in his concurrence in *Graham*, "[while] I expect that the use of force that is not demonstrably unreasonable under the Fourth Amendment only rarely will raise substantive due process concerns . . . until I am faced with [such] a case . . . I do not join in foreclosing the use of substantive due process analysis."¹⁶⁰ The wisdom in Justice Blackmun's resistance to foreclosing substantive due process as a possible alternative standard in analyzing use of force cases is evident when dealing with cases of deadly force where the need for such force presents a "close call." In these cases, the competing interests between deferring to police officers' judgments in tense, uncertain situations that may present grave danger to them and the public on one hand and the fundamental right all individuals possess in their own lives on the other makes assignment of liability a difficult query that must account for both these interests. In such cases, the "objective reasonableness" standard simply does not adequately account for the later interest. Application of the substantive due process standard posed by Judge Friendly provides a more balanced perspective than the "objective reasonableness" lens and goes much further in accounting for the individual's fundamental interest in their own life, regardless of the ultimate outcome.

As the Court announced in *Rochin*, a due process analysis requires, "exercise of judgment upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."¹⁶¹ While this requirement has traditionally been applied to procedural due process (e.g., procedures used in criminal cases must be fair), substantive due process seeks to apply these same "canons of decency and fairness" to the application and enforcement of laws to ensure they respect fundamental individual liberties. The Court has further announced that the Due Process Clause of the Fourteenth Amendment is meant, at a minimum, to "focus . . . on the processes

160. *Graham*, 490 U.S. at 400.

161. *Rochin v. People of Cal.*, 342 U.S. 165, 169 (1952).

by which life, liberty, or property is taken,”¹⁶² and that heightened scrutiny is to be applied to those individual rights that are “deeply rooted in this Nation’s history and tradition.”¹⁶³

Upon this backdrop, as Justice White announced in *Tennessee v. Garner*, it should go without saying that Michael Brown had a fundamental right to his own life.¹⁶⁴ That right deserves heightened scrutiny against adverse application of law. Of course, an individual’s right to life, or any other fundamental right, is not absolute. If by his own actions, Brown took away any practical choice Officer Wilson had to use anything other than deadly force to protect himself or others, then liability would not and should not attach. The ultimate determination of what happened and whether deadly force was utilized as an unfortunate but necessary final option will be decided by those noble twelve tasked with finding truth amongst the competing evidence marshaled by the parties.

However, if the right to life is fundamental, as Justice White suggests, canons of decency and fairness must attach to the processes by which that right is deprived. By using an “objective reasonableness” perspective to govern the police’s use of deadly force, with its wide grant of deference to police’s determination of when circumstances make the use of such force reasonable, heightened scrutiny has not been afforded to the individual’s right to life. As this paper seeks to show, the “objective reasonableness” standard announced by the Supreme Court in *Graham* is inadequate in close cases involving police use of deadly force and results in an imbalance wherein the deference granted to police judgment in the application of force consumes the inherent interest an individual possesses in their own life. This imbalance feeds into the public perception that certain lives simply do not matter in the eyes of the law. Changing the lens with which police use of deadly force is evaluated would lead to a vastly different societal perception of how application of law correlates with substantive notions of justice, fairness and equality.

Even policing agencies seem to recognize that use of deadly force and the standards governing it need to be reevaluated to prevent unnecessary loss of life. This is evidenced by the widespread investment and implementation by police agencies across the nation

162. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

163. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

164. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

in less-lethal force technology such as Tasers, beanbag projectiles, pepper spray, and stun grenades.¹⁶⁵ Police agencies' investment in less-lethal force technology has expanded in the past several years in light of statistical studies debunking traditionalist arguments that reliance on less-lethal force may result in more officer related injuries due to aggressive resistance by suspects not fearing less-lethal force.¹⁶⁶ In the wake of the Brown shooting and other similar contemporary cases, police have begun having officers wear cameras attached to their uniforms to provide more transparency in police tactics generally and use of force scenarios specifically.¹⁶⁷ Police have also recently begun experimenting with casings to place on the muzzle of standard issue police sidearms that make the first ordinary round fired from an officer's service weapon a less-lethal round.¹⁶⁸

A less deferential standard of review of deadly force cases would likely continue to encourage police agencies individually and the Department of Justice collectively to support further research and investment into less-lethal force technologies and related training programs.

CONCLUSION

Given the social unrest surrounding cases like that of Michael Brown and the realization in policing that things may need to change, it is time for the Court to catch up. Complete reliance on the "objective reasonableness" standard with its deferential posture toward police judgments in deadly force cases is outmoded and does not afford proper respect for the sanctity of human life by asking if there is anything that could be done differently to avoid the loss of life. While the

165. See, e.g., *Less-Lethal Technologies*, JUSTNET, http://www.justnet.org/less_lethal_tech/index.html (last visited Aug. 29, 2015).

166. See, e.g., GEOFFREY P. ALPERT ET AL., POLICE USE OF FORCE, TASERS AND OTHER LESS-LETHAL WEAPONS 7–8 (2011); Phillip Bulman, *Police Use of Force: The Impact of Less-Lethal Weapons and Tactics*, NAT'L INST. JUST. J. 4, 4–5 (2011).

167. See, e.g., William Cummings, *Ferguson Police Begin Using Body Cameras*, USA TODAY (Sept. 1, 2014), <http://www.usatoday.com/story/news/nation/2014/09/01/ferguson-police-cameras/14920587/>; Rory Carroll, *California Police Use of Body Cameras Cuts Violence and Complaints*, GUARDIAN (Nov. 4, 2013), <http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto>.

168. See, e.g., Richard Leiby, *Ferguson, Mo., Police Begin Testing New 'Less-Lethal' Attachment for Guns*, WASH. POST (Feb. 4, 2015), http://www.washingtonpost.com/national/ferguson-mo-police-department-is-first-in-us-to-test-less-lethal-gun-attachment/2015/02/03/c6772af8-abb7-11e4-ad71-7b9eba0f87d6_story.html; Aaron Smith, *Ferguson Police Explore 'Less Lethal' Gun Attachment*, CNN MONEY (Feb. 5, 2015), <http://money.cnn.com/2015/02/05/smallbusiness/ferguson-police-less-lethal-gun/>.

Fourth Amendment may very well be the appropriate vehicle for evaluating claims of non-deadly force, it should not be the sole constitutional avenue for challenging police use of deadly force.

The sociological impact of a mostly white court telling a mostly black population in a low-income, urban setting policed by mostly white police officers that a white cop shooting an unarmed black teenager to death was “objectively reasonable” is enormous, regardless of its factual accuracy. If, however, the same court allows a jury of the deceased’s peers to carefully examine the totality of the circumstances and asks the basic question, “Wasn’t there anything else that could’ve been done?”, to which the answer is, “No,” it seems that may be a much easier pill to swallow. The communities most directly affected by these decisions would have an outlet for their grievances and an avenue for true accountability. It may very well follow that the disconnect and discord between the members of those communities like Ferguson and the boots on the ground policing them would begin to be mended.

Returning to the question of responsibility, at the end of the day, who is responsible for the death of Michael Brown . . . ? We may never know for sure. But we do know what questions ought to be asked, and that is all any of us can really ask for.

In addressing the country after the decision was made by the Missouri Grand Jury not to indict Officer Wilson, President Obama offered the following account of race relations in America:

We need to recognize that this is not just an issue for Ferguson, this is an issue for America. We have made enormous progress in race relations over the course of the past several decades. I’ve witnessed that in my own life. And to deny that progress I think is to deny America’s capacity for change.

But what is also true is that there are still problems and communities of color aren’t just making these problems up. Separating that from this particular decision, there are issues in which the law too often feels as if it is being applied in discriminatory fashion. I don’t think that’s the norm. I don’t think that’s true for the majority of communities or the vast majority of law enforcement officials. But these are real issues. And we have to lift them up and not deny them or try to tamp them down. What we need to do is to understand them and figure out how do we make more progress. And that can be done.¹⁶⁹

169. President Barack Obama, Remarks by the President After Announcement of the Decision by the Grand Jury in Ferguson, Missouri (Nov. 24, 2014, 10:08 PM) (on file at

Setting aside any political agenda, there appears to be great wisdom and truth in these words. While the solution to this very serious and age old problem is not obvious or simple, I would suggest that this modification in the application of a law meant to protect the civil rights of *all* Americans is an appropriate and necessary step in the right direction. While this would admittedly be a very modest measure at tackling an issue that our country has grappled with since its inception, as the age old proverb suggests, a journey of a thousand miles begins with a single step.